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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE)
COMMISSION,)
)
Plaintiff,)
)
vs.) Civil Action No.
) 1:22-cv-09803-JSR
GEL DIRECT TRUST,)
GEL DIRECT, LLC,)
JEFFREY K. GALVANI,)
STUART A. JEFFERY,)
)
Defendants.)
_____)

VIDEOCONFERENCE DEPOSITION OF
JEFFREY HOLIK
Wednesday, June 7, 2023
9:02 a.m. CT

Reported by:
Marcia S. McEntee
CSR No. 13399
Job No. 230607MSM

1 A I can't, but it doesn't mean very much because,
2 you know I -- I just can't. It's not a question I know
3 the answer to.

4 Q Other -- other than that time period that you
5 were in what you're characterizing as a policy position at
6 NASD, have you held any appointment since graduating from
7 law school in 1978 that was not involved in law?

8 A No. I would say what I'm currently doing,
9 serving as an expert witness, is not a legal job.

10 Q Other than that?

11 A No.

12 Q Do you hold any securities licenses?

13 A I do not.

14 Q Do you have any professional licenses or
15 certifications other than your law license?

16 A No.

17 Q Do you have any disciplinary history with any --
18 court or professional organization?

19 THE COURT REPORTER: I'm sorry, Counsel. Can you
20 repeat that question again? I'm sorry.

21 BY MR. BERNSTEIN:

22 Q Sure. Do you have any disciplinary history with
23 any court, bar, or professional organization?

24 A No.

25 Q Have you ever been sanctioned by any Court or

1 A Yes.

2 Q All right. So when you spoke to Mr. Uretsky at
3 the inception of your engagement, what did defense counsel
4 ask you to do?

5 A To consider giving an opinion on whether GEL was
6 operating and acting in a capacity that would require
7 registration with the SEC as a broker.

8 Q Anything else?

9 A I don't think so.

10 Q All right. So now I'm going to share the next
11 exhibit. This is not new -- okay.

12 Can you see your expert report now?

13 A Yes.

14 Q Okay. Great. So --

15 A Oops. Just lost it.

16 Q Let me try this again. Okay.

17 Mr. Holik, can you see Exhibit 39 in front of you
18 now?

19 A Yes.

20 Q And is Exhibit 39 -- again, these exhibits should
21 be in your folder too, so if you want to look at them that
22 way, you can. But Exhibit 39 is a copy of -- you
23 identified that as a copy of the expert report that you
24 initially provided in this case.

25 A Okay.

1 vetting or due diligence in accepting the relationship.
2 That is what I can recall right now.

3 Q Your appendix does not include any page numbers
4 or other identifying references to the specific documents
5 that you reviewed. How could I reconstruct a list of the
6 specific documents/materials that you looked at in
7 reaching the conclusions in your report?

8 A I don't know.

9 Q Is that something that you could reconstruct?

10 A I don't know.

11 Q What work, Mr. Holik, if any, did you perform on
12 this matter other than reviewing the documents and
13 materials listed in the appendix to your report?

14 A I interviewed the defendants. Actually, there is
15 a list of the steps that I took in methodology subsection
16 of my supplemental report.

17 Q Yeah, so we'll talk about your supplemental
18 report in a moment.

19 A Okay.

20 Q Right now I'm focussing on the work that you did
21 prior to the issuance of your initial report in this
22 matter.

23 A Yes --

24 Q Well, what work -- and my understanding based on
25 your supplemental report is that you interviewed the

1 Office of Market Regulation at the SEC was engaged in
2 issuing what they call -- it was in 2001 -- "interim
3 final rules," not adopting, but -- but enacting,
4 regulating the -- I've lost my train of thought.

5 The interim final rules implementing the push-out
6 provisions of Gramm-Leach-Bliley and specifically the
7 implementing the rules surrounding the facts that the
8 banks were no longer exempt entirely from engaging in
9 activities without having to be registered. And I worked
10 very close during 2000 and 2001 with staff -- in my role
11 as acting general counsel of NSAD regulation, I worked
12 very closely with Kate McGuire who was then the chief
13 counsel of the division of regulation and Bob Colby who
14 was the deputy director. I worked very closely with them
15 in -- in figuring out how to draw the line between
16 permissible banking activities on the one hand and
17 activities that required registration as a broker on the
18 other hand.

19 And that is really what I'm referring to here,
20 is a number of hours spent with these senior federal
21 regulators whose job it was to define the parameters of
22 broker activities, and I learned a lot from them. And
23 that is what is being reflected here.

24 Q So is there any set methodology that exists for
25 making this determination that you are pointing to beyond

1 just your experience working with that group of regulators
2 approximately 15 to 20 years ago?

3 A I don't think I understand the question.

4 Q Well, maybe I can rephrase it. You said that you
5 followed the methodology employed by federal securities
6 regulators. And I'm asking you how I can determine what
7 that methodology is. Where can I go to see that?

8 A The case law. Case law and SEC guidances.

9 Q Going to the next section of your methodology
10 section of your report, you write: I became familiar with
11 the longstanding factors identify -- identified and
12 applied by the division by the SEC -- let me start over.
13 Let me try to read that.

14 So you write, Mr. Holik, in -- in your report in
15 the second sentence of the methodology section, "There
16 I became familiar with the longstanding factors identified
17 and applied by the SEC Division of Market Regulation, now
18 the Division of Trading and Markets, to determine whether
19 a person should register as a broker." Did I read that
20 correctly?

21 A Yes.

22 Q Again, are these the factors that out of case law
23 and SEC rules?

24 A SEC rules and guidances, yes.

25 Q And case law?

1 A Yes. But, you know, guidances meaning things
2 like no-action letters, the explanatory material in
3 preambles to rules. I mean there's a body of guidance out
4 there indicating and revealing how the SEC, which is the
5 keeper of the rules -- how they go about interpreting
6 whether activity represents broker activity that requires
7 registration.

8 Q Do the factors that are considered to determine
9 whether a person is acting as a broker change or evolve
10 over time?

11 A I think they -- they do.

12 Q How did you determine the current factors used to
13 determine whether a person should register as a broker?

14 A I'm not sure I understand the question.

15 Q Well, you just told me that the factors can
16 evolve or change over time, and you left NASD
17 approximately 17 years ago. So I'm -- I want to
18 understand how in forming the opinions and conclusions in
19 your report you determined, if you did, what the current
20 applicable factors are.

21 A Through a review of applicable guidances.

22 Q Did you look at case law?

23 A I looked somewhat at case law, but I was looking
24 more for SEC no-action letters and guidances.

25 Q If we go to Roman Numeral 5 -- continues which

1 Q And ultimately the Courts have the final say on
2 what constitutes broker activity. Do you agree?

3 A Yes.

4 Q So when you set out to determine what factors you
5 were going to identify as broker's activity, were you
6 looking at only SEC interpretive guidance?

7 A No. I'm -- I'm sure the SEC's guidance over the
8 years has been informed by the judicial outcomes.

9 Q So did you review the case law to determine what
10 the factors that are considered indicative of broker
11 activity are?

12 A I did not do an exhaustive piece of legal
13 research, no.

14 Q Did you -- when you were reviewing the SEC's
15 guidance on these issues, did you see that that kind of
16 cite to case law?

17 A Yes. In some cases it does, of course.

18 Q Are there factors that are considered hallmarks
19 of brokerage activity other than the specific factors that
20 you listed here on pages 9 and 10 of your report?

21 A There -- there may be, yes.

22 Q So how did you decide which factors to include in
23 your list versus which factors not to include on your
24 list?

25 A I put what I thought were the leading factors.

1 Q And what is your basis for saying those are the
2 leading factors?

3 A Just my knowledge and experience.

4 Q Anything else?

5 A No.

6 Q So, for example, one factor that Courts and the
7 guidance considers indicative of brokerage activity is
8 transaction-based compensation. Would you agree with
9 that?

10 A Yes.

11 Q Okay. But you do not include that on your list
12 as a hallmark factor; correct?

13 A I -- I don't. But I do speak to it in my report.

14 Q Why? Why did you not include transaction-based
15 compensation in your list of hallmark factors here?

16 A Because I think it is really in some ways outcome
17 determinative in a -- in a -- in a disingenuous way
18 intellectually. Oftentimes in my experience evaluating
19 the way the SEC interprets things and behaves, if someone
20 is receiving transaction-based compensation, it really
21 pretty much doesn't matter what else they are doing or not
22 doing. They are going to be deemed operating in a way
23 that requires registration.

24 And I confess to a certain amount of cynicism
25 there, but I think that the transaction-based compensation

1 A I don't think it's a hallmark. No, I don't think
2 that was my testimony. I think my testimony was I don't
3 think it's a hallmark factor.

4 Q And do you not believe that transaction-based
5 compensation is a hallmark because that is your opinion or
6 because that is what the Courts and the SEC have
7 determined? I just -- the Courts -- let me step back.

8 Would you agree with me that the Courts and the
9 SEC view transaction-based compensation as a hallmark
10 factor?

11 A Could -- you've asked me a couple of questions.
12 Could you repeat the questions --

13 Q Absolutely.

14 A -- please?

15 Q Would you agree that the case law and the SEC's
16 interpretive guidance consider transactions --
17 transaction-based compensation to be a hallmark factor?

18 A I don't know that I agree with that, no.

19 Q And why don't you agree with that?

20 A Because I don't. I don't know what to say. I --
21 that is not how I interpret it.

22 Q What is the basis of that conclusion?

23 A Maybe it's an understanding or a consensus around
24 what a hallmark is.

25 Q So all right. So, Mr. Holik, you're the expert.

1 a factor that is indicative of broker activity?

2 A I don't really understand the -- all the -- the --
3 I don't understand the question. Some of the terms that
4 you've used I'm not sure I fully understand.

5 Q Well, okay. Maybe I can read it again more
6 slowly. Is the handling of securities or funds of others
7 in connection with securities transactions a factor that
8 is indicative of broker activity?

9 A I suppose yes. But it might depend on what the
10 handling is.

11 Q And had you seen both in the case law and the
12 SEC's guidance that that is considered a factor that can
13 be indicative of broker activity?

14 A Depending upon what the "handling" means, yes.

15 Q Okay. What would the "handling" have to mean?

16 A I -- I can't answer that question in the
17 abstract.

18 Q Why did you not address this factor in your
19 report?

20 A I'm not sure I understand the question. Where --
21 in what section of the report? You're sort of assuming
22 that I would agree that I should have included it. And
23 where would I have included it? In this list that we've
24 been talking about here at the -- what page are we on?
25 I can't see.

1 Q Yeah, we're on -- we're on page 9 and 10 of your
2 report. And so in this section of your work, in your
3 report, you're going through different factors that you
4 believe are indicative of brokerage activity. And so I'm
5 trying to get an understanding of why you did not address
6 the other factors that may be indicative of brokerage
7 activity even if just to explain why they are not
8 applicable here.

9 A No particular reason. It was meant to be
10 illustrative.

11 Q Did GEL handle securities and funds of its
12 customers?

13 A What do you mean by "handle"?

14 Q Were GEL's customers' funds put into accounts
15 controlled by GEL?

16 A Yes.

17 Q And did GEL --

18 A I'm sorry. I'm sorry. Sorry. Are you talking
19 about the banks?

20 Q What do you mean? Bank accounts and both -- yes,
21 bank accounts.

22 A Okay. Bank accounts, yes.

23 Q And did GEL instruct the movement of money in and
24 out of those accounts?

25 A They passed customer instructions.

1 A No.

2 Q Do you identify any specific SEC no-action letter
3 that you believe support your opinions and conclusions in
4 this case?

5 A I -- I didn't find anything directly on that on
6 point on a specific level.

7 Q Let's go to page 10 of your report. Go to the
8 middle of the paragraph on page 10 of your report. You
9 write, "Essentially, the SEC claimed here that GEL must
10 register because it assists investors in transacting
11 lawful securities business that regulators wish would
12 cease to exist." Did I read that one correctly?

13 A Yes.

14 Q What is your basis for your statement that
15 regulators wish that this type of securities business
16 would cease to exist?

17 A Because in my experience the SEC and FINRA are
18 very concerned about fraud, money laundering, and other
19 serious problems in the thinly traded microcap securities
20 area. The regulators spend I'm sure from their
21 perspective an inordinate amount of resources trying to
22 combat those issues and problems and challenges. And so,
23 in my opinion, if they had their druthers, they would just
24 have the market cease to exist.

25 Q And do you have any support for that opinion or

1 basis for that opinion?

2 A Just my -- I don't know -- 25, 30 years of
3 observing the financial services regulatory arena.

4 Q And based on that, do you believe that the SEC
5 and FINRA want to completely stop this part of the market?

6 A That certainly they are concerned about the fraud
7 in the market. They want to eliminate the fraud in the
8 market.

9 Q And do you believe that that is a real risk for
10 fraud in the markets?

11 A Yes.

12 Q And you do you agree that registration of
13 participants is one way to help safeguard against fraud
14 including money laundering and some of the other items
15 that you've listed?

16 A It really depends on what you mean by
17 "participant." Not here.

18 Q Are you writing in the second sentence of this
19 paragraph, "not all acts of participation in the life
20 cycle of a securities transaction trigger a registration
21 requirement"?

22 A Yes.

23 Q Did I read that right?

24 All right. Is the participation a key point
25 in the chain of distribution of securities transactions

1 a factor that is considered in determining whether someone
2 is a broker?

3 A Yes, depending on what the participation and the
4 key points are. I mean, it's a great general statement.
5 And yes, I'm familiar with it. It exists in the body of
6 precedent, but the devil is in the details. What is
7 participation? What are the key points?

8 Q Based also -- let me -- let me ask another --
9 thank you for that.

10 So you talk about the key points in the chain of
11 distribution. Does your report identify and analyze the
12 key points in the chain of distribution with respect to
13 the transactions at issue in this case?

14 A It does not.

15 Q Based on your review of the materials in this
16 case, do you have an understanding that GEL's customers
17 were in most cases looking for a way to deposit and then
18 sell their penny stock securities?

19 A Yes.

20 Q Did you evaluate GEL's participation in the chain
21 of distribution of its customer securities?

22 A Yes.

23 Q Why was that not identified or addressed in your
24 report?

25 A Can't answer that.

1 Q Did GEL -- I think we already talked about this.
2 But GEL received trade order instructions from its
3 customers that it would route to executing brokers;
4 correct?

5 A Correct.

6 Q And was the receipt and then routing of trade
7 order instructions a point in the chain in the
8 distribution?

9 A Yes.

10 Q Did GEL ever provide executing brokers
11 instructions on price and volume terms?

12 A Could you repeat that question?

13 Q Yes. Did GEL ever provide executing brokers
14 instructions on price and volume terms?

15 A Yes.

16 Q Did you have an opportunity to review the
17 Bloomberg chats showing communications between GEL and the
18 executing brokers?

19 A I've looked at some. Yes.

20 Q And are you characterizing those back-and-forth
21 conversations between GEL and the executing brokers in the
22 Bloomberg chat as merely clerical?

23 A Yeah.

24 Q And what is your basis for saying that?

25 A How they looked to me.

1 Q Anything else?

2 A The brokers have the -- the broker-dealer
3 receiving the instructions also has obligations if there
4 was anything unclear. They would be required to seek
5 clarification.

6 Q Right. But that doesn't -- are you done?

7 A Yes. Thank you.

8 Q Yeah, I think that doesn't go to the issue of
9 whether the communication itself was clerical. I want to
10 understand if there is any other bases for you determining
11 that those type of Bloomberg chats were merely clerical in
12 nature.

13 A No, I have no other basis.

14 Q Did the sale of GEL's customers' securities
15 settle in the GEL custodian accounts?

16 A At the -- at the broker-dealers, you mean?

17 Q So no. So my understanding -- and you can
18 correct me if I'm wrong -- is that the -- the sales were
19 made through DVP accounts of the executing brokers, but
20 that the trades actually settled in the custodian accounts
21 because that is where the shares were being held.

22 A Yes, that is my understanding as well.

23 Q Yeah. Okay. So did the sales of the GEL's
24 customer securities settle in the GEL custodian account?

25 A As far as I know, yes.

1 A Yes.

2 Q If we go to page 10 again of your report, which
3 is Exhibit 39, you write in the middle paragraph, "The SEC
4 recognizes that persons who perform largely ministerial or
5 clerical functions with respect to securities transactions
6 need not register as brokers." Did I read that correctly?

7 A Yes.

8 Q What is your basis for concluding that the SEC
9 recognizes that persons who perform largely ministerial or
10 clerical functions need not register as brokers?

11 A Based on my understanding of no-action letters
12 over the years, there is a carve-out from ministerial and
13 clerical activity.

14 Q And what are the activities that constitute
15 ministerial or clerical function?

16 A I think it is a broad-based -- it's, you know,
17 facts and circumstances.

18 Q Are you aware of any listing or identification of
19 those factors that have been provided either by the SEC or
20 in the case law?

21 A I'm not sure I understand the question. You mean
22 a written one?

23 Q If I wanted to go somewhere to determine what
24 constitutes ministerial or clerical function for this
25 purpose, how could I determine that?

1 A By doing research.

2 Q And so you would do research of the case law and
3 SEC no-action letters?

4 A Yes.

5 Q And --

6 A Treatises.

7 Q And is there a comprehensive list or place where
8 those factors are identified anywhere?

9 A The best resource that -- the best single
10 resource that I'm aware of is, there was a treatise
11 written a few years ago with a chapter on broker
12 definition written by Bob Colby. I referenced him before.
13 He was the deputy director of market regulation, and then
14 he went to private practice, and now he is the general
15 counsel of FINRA.

16 But of all the resources that I'm remembering off
17 the top of my head right now, that one strikes me as
18 a very comprehensive compilation of the law on the
19 question of what constitutes a broker.

20 Q And that treatise you believe sets out a list or
21 identification of what services constitute merely clerical
22 or ministerial services?

23 A I don't know that it is an exclusive list.

24 Q But it includes a list?

25 A Well, I don't know what you mean by "list."

1 Q And am I correct that those instructions could
2 have come in the form of a phone call, a text, or an
3 e-mail?

4 A Yes.

5 Q You then write, "I saw no evidence that any
6 investor ever was confused or misled."

7 A Yes.

8 Q What is your basis for that statement?

9 A Based on everything I read, saw, I saw no
10 evidence.

11 Q Did you talk to any of GEL's customers?

12 A I did not.

13 Q How is when an investor was confused or misled
14 relevant to the determination of whether GEL was required
15 to register as a broker?

16 A Because I think it is relevant to the important
17 question of whether there is a need for regulation.

18 Q Similarly, you write, "I am not aware that any
19 investor, bank, or broker-dealer complained about GEL's
20 services." Do you see that?

21 A Yes.

22 Q And, again, that is just based on your review of
23 the documentary material that was provided in this case?

24 A The documentary and -- material as well as the
25 review of transcripts as well as my interviews with the

1 defendants.

2 Q Did you have any communications with any bank or
3 broker-dealer that did business with GEL --

4 A I did not. Not -- no, I did not.

5 Q Again, how is whether an investor claimed or
6 a broker-dealer complained about GEL services relevant to
7 a determination as to whether GEL is required to register
8 as a broker?

9 A Same answer as before.

10 Q That is that it goes to the issue of whether
11 there is a need for regulation?

12 A Yes, in my opinion.

13 Q All right.

14 MR. BERNSTEIN: We've been going for about an
15 hour and a half. Why don't we take another break if that
16 is okay with everyone.

17 John, I don't have much -- I don't -- it is up
18 to you. I have a habit of taking a lunch break. But
19 I actually don't have that much more, so I will let you
20 two decide whether or not you want to power through or --
21 as to my questions I probably have an hour left, maybe not
22 even an hour, so.

23 THE WITNESS: I vote for powering through.

24 MR. BERNSTEIN: Okay. Fair enough.

25 John, is that okay with you?

1 GEL account?

2 A At the bank.

3 Q Yes. At the GEL account at the bank.

4 A Yes.

5 Q Did the banks put any restrictions on GEL's use
6 or disbursements of those securities?

7 A I don't know.

8 Q You go on to write on page 5 of your supplemental
9 report, "Likewise, executing broker-dealers knew that GEL
10 was acting in an agency capacity on behalf of the
11 beneficial owners of shares, and they reported sales
12 transactions directly to the custodial banks." Did I read
13 that correctly?

14 A Yes.

15 Q And, again, what is your basis for that
16 conclusion?

17 A And, again, it is information that I learned from
18 interviewing the defendants as well as some review of
19 documents and information.

20 Q And how is that important or relevant to your
21 conclusions and opinions in this case, if at all?

22 A Because from my perspective and in my opinion,
23 the fact that the executing broker-dealers were aware that
24 GEL was acting on behalf of GEL's customers together with
25 the regulatory expectations and the duties that FINRA

1 imposes on the executing broker-dealers together -- taken
2 together, those things, in my opinion, weigh on the
3 question of whether additional regulation is needed here
4 by way of requiring GEL to register, or whether given the
5 level of awareness on the part of the broker-dealers and
6 their regulatory responsibilities to proactively police
7 for fraud and other behavior of concern in these markets
8 whether a registration of GEL is required. I think that
9 is the relevance of it.

10 Q So -- so, again, the issue of -- well, whether
11 there is a need for regulation based on your review of the
12 material?

13 A Yeah, that is certainly a big part of it. It is
14 the other end of the pipe; it is the end of the pipe, that
15 is already, in my opinion, adequately regulated by
16 securities regulators through their oversight of the
17 executing broker-dealers.

18 Q Let's go -- going back now to Exhibit 39, which
19 is your initial expert report. I want to go to page 11 of
20 that. And at page 11 we get to your opinion with respect
21 to the banks not being under SEC jurisdiction. Do you see
22 that?

23 A Yes.

24 Q Is it my understanding -- strike that.
25 Is your opinion in this section, section C,

1 of the Opinion section of your report that the SEC did not
2 have jurisdiction over the custodial bank accounts and
3 that those were subject to federal banking regulation?

4 A I would put that in the present tense. Yes.

5 Q Okay. So why -- maybe it is better for you to
6 provide what your opinion is than it is for me rephrase it
7 for you. So what is your opinion that you provide in
8 section C of the Opinion section of the report?

9 A Of that the custodial activities and accounts at
10 the banks are not subject to SEC jurisdiction.

11 Q All right. Is it your contention that the fact
12 that GEL used banks regulated by banking laws impacts
13 whether they were required to be registered as brokers
14 under the securities law?

15 A Yes, it does.

16 And -- and the reason being that a good part of
17 the foundation for the SEC's case is that GEL is involved
18 in custodial activities on behalf of its customer and that
19 those custodial activities require broker-dealer or broker
20 registration.

21 And so my opinion is that a good part of the
22 foundation of the case does not sort of hold water
23 intellectually because all of the custodial activities are
24 already -- at the banks are already fully regulated, so we
25 don't need the SEC running in and requiring GEL to

1 register as a broker because any of the things -- because
2 of any of the things that are going on at the banks.

3 Q So, again, that goes to your point that you don't
4 believe that regulation is necessary here because the
5 custodial banks are already regulated by federal banking
6 laws?

7 A It goes to that, but I think it goes a little bit
8 farther. It goes to whether the hallmark factors whether
9 the factors that comprise, you know, whether someone
10 acting as a broker exists because you're claiming -- not
11 you personally -- but the complaint alleges that the
12 custodial activities that go on at the banks are -- is
13 behavior for which GEL ought to be registered as a broker.
14 I guess my opinion is I don't see how intellectually that
15 holds water.

16 Q All right. Is your opinion -- would you agree
17 with me, though, that the custodial bank accounts were GEL
18 accounts, in other words, weren't individual accounts in
19 customers' names?

20 A Yes.

21 Q And would you agree that any insurance or other
22 protections over the custodial accounts would apply to the
23 GEL account -- the GEL account?

24 A Could you clarify the question? When you say any
25 "insurance," would you be more specific?

1 learn quite a bit about the extent to which custodial bank
2 activities involving securities are actually not subject
3 to SEC jurisdiction.

4 And then when I got over to the bank, there is
5 this safekeeping and custody exception. That is what
6 Reg R calls the kind of traditional banking activities
7 involving securities and custodial activities. And I got
8 involved when I was working at the bank on counseling the
9 bank to ensure that the bank consistent with OCC guidance
10 was operating within the parameters of the exception.

11 So that is how I sort of got to the conclusion
12 when I looked at the facts of this case that these
13 custodial accounts at the banks do not appear to be
14 subject to SEC jurisdiction.

15 Q Right. But I do want to kind of break it up and
16 be a little bit more specific.

17 So there is the custodial banks and their
18 activities, and I think maybe we can agree that the banks
19 themselves are not subject to SEC jurisdiction. Did you
20 agree with that?

21 A Yeah, I agree that the banks are certainly not
22 subject to SEC --

23 Q So is it your opinion, though, that the
24 activities in GEL using those banks cannot be subject to
25 SEC jurisdiction?

1 A I believe they are not. Right, that is my
2 opinion, they are not --

3 Q So --

4 A Can I finish?

5 Q Yeah.

6 A My opinion is that they should not be subject to
7 SEC jurisdiction because they are already -- all of their
8 activities, no misbehavior, any accounting irregularity,
9 any refusal or failure by GEL to honor customer
10 instructions, to the extent that any of that is occurring
11 as a result of or arising out of these accounts at the
12 banks that are fully regulated, yes, my opinion is the SEC
13 does not have jurisdiction over that.

14 Q And to clarify, in your first statement you said
15 SEC should not have jurisdiction, and then in your last
16 statement you said that the SEC does not have
17 jurisdiction. I want to understand if it is your opinion
18 that they should not have jurisdiction, or do you have
19 a basis for saying that they do not have jurisdiction?

20 A I'm sorry. They do not have jurisdiction. And
21 my basis is what we really just talked about.

22 Q And do you have any legal or other authority to
23 support that conclusion?

24 A Yes. It would be Reg R, Gramm-Leach-Bliley, the
25 push-out provisions, and then Regulation R that was issued

1 by the banking -- jointly by the SEC and the banking
2 regulators in 2007. And it talks about custodial and
3 safekeeping accounts. That would be my basis.

4 Q And do you agree with me that the regulation or
5 provisions apply to banks?

6 A Yes.

7 Q And do you also agree with me that GEL is not
8 a bank?

9 A Yes.

10 Q And do you believe that you are in a better
11 position than the Court to determine whether the SEC has
12 jurisdiction over GEL in this case?

13 A I -- I can't answer that. It would be
14 presumptuous of me to say I'm in a better position.
15 I will say, however, that I have 25 or 30 years of
16 experience in financial services, including an intensive
17 experience on the application of Gramm-Leach-Bliley and
18 the jurisdictional limits that the SEC has over bank
19 activities.

20 And I do think I'm highly knowledgeable and
21 experienced in that area, but -- but to say that I'm in
22 a better position than the Court, no, I probably wouldn't
23 say that.

24 Q If we go to page 12 of your report, we get to the
25 next one of your opinions, and that relates to the fact

1 Q But did GEL actually identify its underlying
2 customers to the executing brokers, who they were?

3 A I don't know.

4 Q Who was the executing broker's customer?

5 A GEL.

6 Q You go on to write in this section of your
7 report: Moreover, as gatekeepers to the public securities
8 market, broker-dealers are expected by securities
9 regulators to take steps proactively to strengthen their
10 controls to detect and deter potential fraud involving
11 low-priced securities and then thereby protect investors
12 from financial harm.

13 Did I read that correctly?

14 A Yes.

15 Q And would you agree not only does that serve to
16 protect investors, but it can also serve to protect the
17 market itself?

18 A Yes.

19 Q And do you believe that this gatekeeper function
20 is an market protection?

21 A Yes.

22 Q You go on to write that "there is evidence that
23 the executing broker-dealers conduct a due diligence and
24 oversight of the accounts consistent with regulatory
25 requirements and expectations." Did I read that

1 MR. URETSKY: Objection to form. Guys, hold on.
2 I wanted to get an objection in there just for -- if you
3 can just clarify which law firm it is, so we know it's not
4 me.

5 MR. BERNSTEIN: Which law firm it was? Yes, I --

6 MR. URETSKY: I mean, I know it's Lucosky,
7 Brookman. My main point is it is not defense counsel.

8 MR. BERNSTEIN: Correct.

9 MR. URETSKY: Not GEL's current defense counsel.

10 MR. BERNSTEIN: Agreed.

11 BY MR. BERNSTEIN:

12 Q Mr. Holik, would you consider that service that
13 GEL was providing to the customers having the outside
14 law firm review the securities to determine that they
15 could be deposited and traded is ministerial or clerical
16 function?

17 A I don't know. I would consider it to be a risk
18 management function.

19 Q Okay. So going back to what we were just talking
20 about in the due diligence that the executing brokers were
21 performing, in your opinion, did the executing broker
22 firms perform any due diligence on GEL's underlying
23 customers?

24 A I don't know.

25 Q So can you tell us like you did for the other

1 sections we just went through what the opinion is that you
2 were offering in this section of the report?

3 A The opinion is the securities sales at issue in
4 this case are already subject to regulation by the SEC and
5 FINRA.

6 Q And why is that relevant, if it is, to the
7 determination of whether GEL was required to register as
8 a broker?

9 A Because from a policy perspective, it is
10 appropriate to inquire as to whether regulation would
11 protect investors, protect markets, or -- on the other
12 hand, impede the development of technological advances and
13 efficiencies and cost reductions to the marketplace. And
14 so the question of whether behavior of concern is being
15 called out in the complaint is already subject to
16 regulatory oversight and control, to me, in my opinion,
17 is highly relevant.

18 And I actually learned that from Kate McGuire and
19 the folks at the SEC years ago. And it is one of the
20 things that they look at, is the need -- before they sort
21 of jump into a field and say, "We're going to regulate
22 it," they sort of look to see what the existing landscape
23 is. So to me it is relevant.

24 Q Okay. Can there be more than one registered
25 broker in the chain of distribution on a securities

1 transaction?

2 A I'm not sure I -- I understand the question.

3 Q So you're familiar with the term "introducing
4 broker"?

5 A Yes.

6 Q What is an introducing broker?

7 A And introducing broker is an order-taker,
8 a storefront, a low -- high -- a low capital requirement
9 broker-dealer that served as the interface essentially
10 between a customer and a clearing firm.

11 Q And an introducing broker needs to be registered?

12 A Yes.

13 Q You mentioned in your answer the term "clearing
14 firm." Is a clearing broker another type of broker that
15 might be involved in the chain of distribution?

16 A Yes.

17 Q And what does a clearing broker do?

18 A A broker that actually holds customer funds, goes
19 into the marketplace, and obtains the execution of
20 a transaction.

21 Q And clearing brokers have to be registered as
22 well?

23 A Yes.

24 Q And we've been talking about executing brokers;
25 correct?

1 A Yes.

2 Q And what does an executing broker do?

3 A Well, an executing broker-dealer I'm assuming
4 we're talking about introducing brokers. An executing
5 broker-dealer is not a third category of broker. There
6 are introducing brokers; there are clearing brokers. I'm
7 not -- I'm not familiar with a separate, distinct legal
8 or regulatory category called "executing brokers." I
9 think it --

10 Q So you're not familiar with industry parlance for
11 executing brokers?

12 A I am, but I don't think it's a separate species
13 of broker-dealer.

14 Q You -- before you said that introducing brokers
15 were typically the front-office client-facing broker --

16 A Yes.

17 Q -- correct?

18 A Yes.

19 Q And here the executing brokers were GEL-facing;
20 is that fair?

21 A Sure.

22 Q Is there any exception to registration that
23 applies based on the fact that another broker involved in
24 a securities transaction is already registered?

25 A No.

1 Q And seeing them both on the same documents, does
2 that refresh your recollection about why this document was
3 important?

4 A Again, to the point that I've been making, yes.
5 It reflects the knowledge -- communication, transparency,
6 and knowledge involved.

7 Q All right. Thank you.

8 MR. URETSKY: And you can take this down if you
9 don't mind.

10 I guess I have one sort of conclusory -- I'm sure
11 it's come up. But in your expert opinion, sir, did GEL
12 need to register as a broker?

13 THE WITNESS: No, they did not.

14 MR. URETSKY: I have nothing further. Thank you.

15 MR. BERNSTEIN: Thanks. Okay.

16 So, Jon, if you just want -- if you have only got
17 one document, I can -- we can let the witness go, and
18 I can -- do you want to just -- me to call you or you to
19 call me all about the Court scheduling issues?

20 MR. URETSKY: I can -- we can either call, or
21 I thought you had said we were going to do it from here.
22 Or if that is too hard, I will just call you.

23 MR. BERNSTEIN: I think the phone may be better.
24 You're kind of breaking up a little bit.

25 MR. URETSKY: Oh, I'm sorry. I was unaware.

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